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No. 78-1281

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

IOWA BEEF PROCESSORS, INC.,

Petitioner,

vs.

NEAL SMITH, Chairman of the Subcommittee on SBA and SBIC Authority and General Small Business Problems of the Committee on Small Business, United States House of Representatives,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITIONER'S REPLY

EDWARD W. ROTHE
JAMES T. MALYSIAK
FREEMAN, ROTHE, FREEMAN & SALZMAN
One IBM Plaza - Suite 4735
Chicago, Illinois 60611
(312) 467-5330

Counsel for Petitioner

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PETITIONER'S REPLY

The Small Business Subcommittee studiously avoids wrestling with the specific legal questions raised by IBP's Petition and instead hides behind the Speech or Debate Clause to defy the authority of the Judicial Branch to protect litigants and the integrity of court orders from unnecessary and improper legislative interference. The Court of Appeals capitulated, when confronted by one congressman purporting to represent the United States House of Representatives, by distorting the rules governing its jurisdiction to allow the Subcommittee to elude any judicial remedy for lawlessness masquerading as investigation. It is squarely up to this Court to instruct the Court of Appeals that, however dif-

ficult the task, a federal court must not evade difficult substantive decisions through jurisdictional sleight-of-hand.

1.
THERE IS A SQUARE CONFLICT ON COLLATERAL ORDER APPEALABILITY

The Subcommittee (Br. 15) shuns any legal analysis on the appealability issue and instead simply rests with the Eighth Circuit's patently erroneous interpretation of the collateral order rule. It does not even attempt to distinguish the contrary authorities cited in IBP's Petition (pp. 14-15)—perhaps because the Subcommittee itself relied on the *Cohen* doctrine in the Fifth Circuit in appealing Judge Taylor's refusal to modify his protective order (conceptually the same issue presented here).[1] The Subcommittee's arguments are plainly not derived from consistent legal principles, but rather from pure expediency.

The Eighth Circuit's gross manipulation of the collateral order jurisdictional rule to avoid IBP's demand for relief cannot be allowed to confuse the application of the finality and mandamus rules among the Circuits. IBP's challenge to the Court of Appeals' holding is

[1] "Congressional-Appellants submit that the order below, refusing a petition by non-party litigant congressional subcommittees to clarify or modify an existing protective order to permit compliance with congressional subpoenas, falls clearly within the 'collateral order doctrine' exception to the finality strictures of § 1291. * * * As a practical matter, Congressional-Appellants will never obtain review of the lower court's holding if the Court refuses jurisdiction now". (Response of Congressional-Appellants to Motion of the National Provisioner, Inc. to Dismiss Appeal in No. 78-3344 (5th Cir.), at 1,3) In fact, the Fifth Circuit did not dismiss the Subcommittee's appeal for lack of jurisdiction, but because the Subcommittee lacked House authority to take any court action.

further supported by Chief Judge McManus' extraordinary Petition for Rehearing and Reconsideration which also attacks the Eighth Circuit's "cavalier and indiscriminate use of the mandamus power to order the doing of a useless and futile act and 'to mask a questionable jurisdictional decision' * * *." (Subcomm. Br. App. A-42, 50.) Indeed, the very filing of such an after-the-fact challenge by the District Court demonstrates the extent to which the Court of Appeals lost control of the proceedings in this case.

The Eighth Circuit purposely generated a conflict among the Circuits on a critical jurisdictional concept to permit the Subcommittee to violate a court order without redress, and neither the Court of Appeals nor the Subcommittee should be allowed to get away with it.

2.
THE SUBCOMMITTEE CANNOT VIOLATE A COURT ORDER WITH IMPUNITY

The Subcommittee's main defense of the Eighth Circuit's wrong-without-a-remedy holding is to deny that the Judicial Branch has any authority over the congressional violation of a court order. The Subcommittee contends that even if the protective order modification were appealable and, as a result, the Subcommittee violated the protective order by covertly seizing the documents during the 10-day automatic stay, the courts can do nothing about it.[2]

[2] The automatic 10-day stay provided by Rule 62(a) serves the critical function of preserving the *status quo* until the party adversely affected by a district court order receives notice of the order and has an opportunity to consider its alternatives, such as taking an appeal or seeking a stay, before the judgment is enforced. See 7 Moore's Federal Practice ¶ 62.03 (2d ed. 1978). IBP was plainly deprived of the protection afforded by Rule 62(a).

The Court of Appeals backed down from this challenge despite the inherent power of the federal courts to protect their orders from interference by third parties. See *Ex parte Robinson*, 19 Wall. (86 U.S.) 505, 510 (1874); *Craig v. Hecht*, 263 U.S. 255, 268-269, 277 (majority), 278 (Taft, C.J., concurring), 280 (Holmes, J., dissenting) (1923); *United States v. Hall*, 472 F.2d 261, 264-266 (5th Cir. 1972); 18 U.S.C. § 401. In addition to the inherent contempt power, the All Writs Statute provides authority extending "to persons who *though not parties* to the original action or engaged in wrongdoing, are in a position to frustrate the implementation of a court order or the proper administration of justice." *United States v. New York Telephone Co.*, 434 U.S. 159, 174 (1977; emphasis added).

The Subcommittee's argument that it was not "named" a party below and thus is not subject to these fundamental judicial powers is legally untenable, and it also misrepresents the facts. This Petition arises from the lower courts' refusal to exercise their jurisdiction over the Subcommittee, as IBP consistently argued they could and must. At every step IBP "named" the Subcommittee as the party interfering with court processes and demanded relief. On October 11, 1978, when IBP first learned that the Subcommittee intended to review privileged IBP documents in Bagley's hands, IBP moved the District Court to impound the documents which would have forced the Subcommittee to intervene formally if it wanted the protective order modified, but the District Court refused. On November 29, 1978, when IBP learned of the modification order and the Subcommittee's document seizure, it moved the District Court to order the Subcommittee chairman, counsel, and investigator to return the documents or show cause why they should not be held in contempt, but the District Court refused even to rule on the motion. IBP then

sought emergency relief from the Court of Appeals, which was granted in an order that was binding on the Subcommittee.[3]

Thus, the Subcommittee's contention that IBP did not object to its "special appearance" is absurd, since IBP continually implored the courts to *compel* the Subcommittee to appear and obey appropriate judicial orders. The District Court, whose order was violated, was the proper forum for contempt or All Writs Statute proceedings, *Stiller v. Hardman*, 324 F.2d 626, 628 (2nd Cir. 1963), not some uninvolved court in a different jurisdiction, as the Subcommittee facilely suggests (Br. 12-13). Unless the Judicial Branch utilizes its powers to enforce court orders against the other Branches, those Branches will be free "to treat with impunity the valid orders of the judicial branch." *Nelson v. Steiner*, 279 F.2d 944, 948 (7th Cir. 1960).

3.

THE SPEECH OR DEBATE CLAUSE IS A SHIELD, NOT A SWORD

The Subcommittee claims Speech or Debate Clause power to foment litigation, violate court orders, and then deny judicial jurisdiction to remedy any resulting injury. This argument totally misconceives the historic function of the Speech or Debate Clause to shield legislators from judicial intervention in their Article I functions and attempts to warp it into a weapon for restricting the Article III authority of the courts.

The Subcommittee's contention that the Speech or Debate Clause confers absolute immunity on it from any

[3] "IT IS FURTHER ORDERED that pursuant to Chairman Smith's agreement hereinabove mentioned, the Committee Staff and others acting in concert with them shall take no action with respect to the materials, the subject of this order, other than to protect them from scrutiny and disclosure during the effective life of this order." (Pet.App. A-16.)

court sanctions regardless of how it conducts its investigation is refuted by the very decisions of this Court upon which the Subcommittee purports to rely:

> In no case has this Court ever treated the Clause as protecting all conduct *relating* to the legislative process. In every case thus far before this Court, the Speech or Debate Clause has been limited to an act which was clearly a part of the legislative process—the *due* functioning of the process. * * *
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> * * * Admittedly, the Speech or Debate Clause must be read broadly to effectuate its purpose of protecting the independence of the Legislative Branch, but no more than the statutes we apply, was its purpose to make Members of Congress super-citizens * * *. [*United States v. Brewster*, 408 U.S. 501, 515-516 (1972); emphasis in original; footnotes omitted.]

It is clear, for instance, that the illegal seizure of documents by Members or their staff would not be entitled to Speech or Debate Clause immunity. *Gravel v. United States*, 408 U.S. 606, 621 (1972); *Dombrowski v. Eastland*, 387 U.S. 82, 84 (1967). Similarly, the actual distribution to the public by Members or their staff of materials which violate the rights of individuals would not be protected by the Clause. *Doe v. McMillan*, 412 U.S. 306, 314-315 (1973). These limitations on the scope of the Speech or Debate Clause were fully confirmed in *Eastland v. United States Servicemen's Fund*, 421 U.S. 491, 507-508 (1975), upon which the Subcommittee mainly relies.

Considered in light of the purpose of the Speech or Debate Clause and the limits of the immunity provided by it under this Court's decisions, the Subcommittee cannot seek refuge behind the Clause. Its very possession of the documents was gained by violating Rule 62(a) and the District Court's protective order. It monitored litiga-

tion to obtain the documents from IBP's litigation adversaries and forced a party to move for a modification of the District Court's protective order under threat of congressional contempt. Under these circumstances, the Subcommittee is hardly being hauled into court to answer for acts which are "clearly a part of the legislative process—the *due* functioning of the process." *(Brewster, supra.)* It has *caused* this controversy, and it must be subject to the judicial power to restore the *status quo*. The Subcommittee's claim that the Speech or Debate Clause permits violations of court orders by congressmen to go unremedied is unprecedented and insidious.[4]

4.

THE SUBCOMMITTEE COMPLETELY IGNORES IBP'S DUE PROCESS RIGHTS

The Subcommittee's brief (pp. 16-18) displays a total insensitivity to IBP's due process right to have *some* forum for asserting its rights not to have privileged information disclosed publicly. Under normal circumstances, the usual congressional procedures would have provided such a forum. If the documents had been sought from IBP, IBP would have been entitled to an explanation of the nature and scope of the investigation, it would have had the right to object to the Subcommittee's attempt to subpoena documents not pertinent to

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[4] One District Court has presciently foreseen this danger:

> "While no improper motive is attributed to the Congress as an institutional body, any group that large has a reasonable likelihood of containing one or two members with ulterior motives, and the problem of a Senator McCarthy has not been solved. It takes only one member of Congress, using the speech and debate clause, to destroy proprietary information without known remedy to the victim." *Wearly v. FTC*, 462 F.Supp. 589, 600 n. 13 (D.N.J. 1978).

the investigation or privileged, and it could have enforced its rights by refusing to comply and defending a prosecution in a federal court under 2 U.S.C. § 192 (if House authorization for such a prosecution were obtained) on the basis of its objections. *Watkins v. United States*, 354 U.S. 178 (1957).

The Subcommittee, however, found a way to evade those constitutionally mandated procedural rights by subpoenaing the documents from IBP's litigation adversary and staying out of court itself. Unless this tactic is nipped in the bud it will undoubtedly be employed again and again by congressional investigators interfering with litigation to obtain documents without procedural restrictions.

5.

THE SUBCOMMITTEE CITES NO HOUSE AUTHORIZATION FOR ITS SPECIAL APPEARANCE

The Subcommittee argues, without authority (Br. 18-19), that its voluntary "special appearance" to deny jurisdiction did not require House authorization, although it apparently concedes that it needed such authorization for its involvement in the Fifth Circuit proceedings. There is no distinction: The Fifth Circuit specifically held that the Subcommittee had cited no rule or statute "that confers general authority to prosecute or intervene in law suits *or undertake other actions in the courts.*" (Pet. App. B-12; emphasis added.)

IBP contended below that the courts had the power to order the Subcommittee to return or restrict the use of documents taken in violation of a court order. The Subcommittee tried to finesse the problem by denying court jurisdiction and yet arguing the merits, and the Court of Appeals tolerated this blatant manipulation of

procedures. This is no titanic confrontation of Branches of Government, but rather one congressman thumbing his nose at the courts and the rule of law. There has been no showing that the House of Representatives endorses these legal maneuvers done in its name or that it approves the Subcommittee's evasion of judicial remedies.

6.

IBP'S RIGHTS UNDER THE PROTECTIVE ORDER HAVE BEEN ABUSED

The history of the controversy reveals a complete inability or, more likely, lack of will on the part of the lower courts to handle the protective order questions in a forthright manner. IBP's rights have been abused and will be denied unless this Court intervenes.

The Court of Appeals decided to make an erroneous jurisdictional decision to avoid giving IBP relief, trusting that this Court would not reverse because of the technical nature of the question and the crowded certiorari docket. Now the District Judge, stung by the Court of Appeals holding that he committed a "clear abuse of discretion" in permitting the Subcommittee to take the documents without limiting their improper disclosure, has filed an unprecedented retrospective opinion in the nature of a petition for rehearing which suggests that what he wrote in his orders granting the protective order and later modifying it did not reflect the actual grounds for his decisions or certain reservations and concerns which he never expressed. (Subcomm. Br. App. A-46-48.) For example, the District Court now suggests that only a token resistance was filed against IBP's motion for a protective order, that IBP relied solely on a conclusory affidavit to support that motion, that Bagley had already revealed the documents to "untold numbers" of persons, that IBP made no showing of its right to the documents when it

moved for the protective order, and that IBP did not move for an injunction to recover the documents. But there was no hearing on Bagley's motion to modify and none of these matters was raised either by the parties or by the District Court. Had IBP known of these concerns, it could have corrected the District Court's misconceptions of the clear record. IBP's original motion for protective order was hotly contested and was supported not only by a competent affidavit but also by the depositions of two witnesses and the inherent proprietary nature of the documents themselves.[5] The fact that Bagley had disclosed the documents to certain unauthorized persons was what triggered IBP's suit and further disclosure by allowing the Subcommittee unfettered access merely exacerbates the injury. And IBP did in fact move for summary judgment—requesting the District Court to compel the return of the documents on the undisputed facts that Bagley had taken IBP confidential documents, but the District Court decided that such relief was premature. IBP never had a right to address these matters in the District Court and if the Eighth Circuit had exercised normal appellate jurisdiction, instead of mandamus, there would have been no occasion for Chief Judge McManus to inject himself into the mandamus proceeding as an adversary.[6]

The lower courts having abjectly failed to handle this controversy properly, it is the duty of this Court to set them back on course with firm instructions.

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[5] Judge Taylor, in Dallas, independently ruled that if Chief Judge McManus had not already covered the Bagley documents with a protective order, he would have done so. (Pet. App. B-3.)

[6] The District Court also takes the view that "no absolute privilege exists for trade secrets let alone business records" (Subcomm. Br. App. A-47), and thus fails to appreciate that the Fifth Amendment bars governmental destruction of proprietary information without just compensation and that the Subcommittee is bound by that absolute rule. *Wearly v. FTC*, *supra*, 462 F.Supp. at 596-597.

CONCLUSION

Certiorari should be granted to resolve the conflict between the Eighth Circuit and the Fifth and Seventh Circuits on the appealability of orders granting final access to a third party's documents, to reaffirm the power of the courts to protect their process against unwarranted Congressional interference, and to require Subcommittees to obtain proper authorization when they go to court.

Alternatively, since the Subcommittee avowedly (Br. 10) intends to use the documents in impending hearings, the Court should consider summary reversal on the appealability issue alone which would mean that the protective order was in effect when the Subcommittee seized the documents. With respect to relief, this Court could either order the restoration of the *status quo ante*, with leave to the Subcommittee to follow proper intervention procedures to obtain access to the documents, or direct the lower courts to consider appropriate relief for violation of the protective order.

If either plenary consideration of all issues or summary reversal on appealability is granted, the Court should also suggest, if not order, that the Subcommittee not disclose the documents until the issues are resolved.

Respectfully submitted,

EDWARD W. ROTHE
JAMES T. MALYSIAK
FREEMAN, ROTHE, FREEMAN & SALZMAN
One IBM Plaza - Suite 4735
Chicago, Illinois 60611
(312) 467-5330

Counsel for Petitioner

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